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Introduction

When wrongful convictions in child death cases are examined, the outcomes of such cases are conventionally attributed to flawed expert evidence and opinions. This paper proposes that interpretations of the behaviours of the mothers around the time children died may also have contributed to the miscarriages of justice. Such a possibility echoes the consequences when rape complainant behaviours around the time of a sexual assault are adversely portrayed and perceived. One aspect of women’s legal history is I suggest the body of knowledge or ‘cultural resource’ arising from research into women’s experiences of assault compiled by feminist researchers, if not historians. Such a history includes a developing understanding of the ways in which interpretations of the feminine around the time of a sexual assault are constructed within the criminal justice system and more broadly, and the nature of rape myths. This paper suggests that charting the history of our understanding of rape myths, may enable new ways of understanding maternal behaviours when children die suddenly.

3 Including whether the mother: commenced immediate resuscitation; called the ambulance, or failed to call the ambulance; called her husband first; used an apnoea monitor consistently or not; forgot in which cot a baby died; had an addiction or dependency; reacted hysterically or over emotionally, or in an attention seeking way. Other behaviours that may be found are mothers who: were inexperienced; had unrealistic expectations; found it difficult to bond with her child; gave the child to someone else to care for; disliked being home alone; felt resentful if their partner was away from home; had had a previous cot death; had a dirty home; was vulnerable or who had been abused as a child; went back to work.
4 Behaviours described for example as: failure to cry or ‘fight back’; ‘overly hysterical’ behaviour or composed demeanour; failure to report an incident, under the influence of alcohol or the wearing of ‘immodest dress’. ‘Women often make up rape accusations as a way of getting back at men’; ‘women cry rape' only when they've been jilted or have something to cover up’; ‘a woman who initiates a sexual encounter will probably have sex with anybody’; ‘a woman shouldn’t give in sexually to a man too easily or he’ll think she's loose’; ‘men have a biologically stronger sex drive than women’; ‘a woman who goes to the home or apartment of a man on their first date implies that she is willing to have sex’; ‘it isn’t a rape unless he has a weapon’; ‘one reason that women falsely report a rape is that they frequently have a need to call attention to themselves’; ‘women often provoke rape through their appearance or behaviour’; ‘men often can’t control their sexual urges’.
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Although rape myth scholarship has focused on the experiences of ordinary women and might be perceived as recent, or even contemporary, such events as history can shed light on the present and challenge both male and female expectations of norms and realities in relation to behaviour. Scant attention has been paid to the way in which particular maternal and or carer behaviours are interpreted within the criminal justice system when a child has suddenly and inexplicably died and how those perceptions may influence trial outcomes. Rape myth scholarship and research on the other hand has been highly successful in focussing on the real experiences and meanings of particular female behaviours before, during and after the time of a sexual assault, and showing how these may be adversely perceived, and how such perceptions may lead to false inferences at trial.

This paper seeks to show how likewise, the identification of particular maternal behaviours admitted as evidence in criminal trials, may lead to adverse perceptions, but the inferences drawn may be incorrect. The paper re-defines a mothering myth using and analogising from Gerger et al’s understanding of a rape myth, which is based on ‘the most advanced measure of rape myth acceptance to date’. In the same way that Gerger’s rape myth definition profoundly assists our understanding of rape myths, so it is hoped that the proposed new definition of a mothering myth may become a helpful device with which child death cases can be interrogated to illustrate how mothers may be wrongly portrayed and perceived.

By examining child death cases a number of female behaviours noted with them have been identified, and these have been compared to the current theorisations of motherhood and

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8 Conaghan J, Russell Y, (n 7) 26, 35.
9 *Clark (No 2)* and *Cannings* (n 1).
10 (n 3).
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mothering, such as ideologies, discourses and myths. Although insightful, such theorisations are broadly construed and become problematic when applied to child death cases because, maternal behaviours admitted as informal and background circumstantial evidence in the child death cases are so factually precise. Consequently, there is no current means of evaluating beliefs about particular maternal behaviours identified in appeal reports in order to clearly demonstrate both the lack of evidential relevance of certain behaviours and their possible prejudicial impacts in the criminal justice system through adverse interpretations.

In contrast, rape myth scholarship is an historical resource, demonstrating a particular phase and aspect of women's recent legal history, in which feminist writers and academics have sought to identify what is really meant by a rape myth. The purpose has been to identify the beliefs that may be held about women’s behaviour around the time a rape or sexual assault is alleged to have occurred, and to understand which beliefs may then adversely interpret women’s behaviours in the criminal courts. Such beliefs may be used to undermine a claimant’s argument that rape or sexual assault took place, even though such interpretations of female behaviour lack probative value. As a result of rape myth scholarship, some behaviours are now inadmissible, and may be the subject of judicial directions miscarriages of justice may therefore be averted.

The development of or the history of feminist understandings of rape myths shows how research has become more focussed on identifying particular beliefs using questionnaire

12 (n 4).
13 Such as sexual history in rape trials see s 41 (1) Youth and Criminal Justice Act 1999 ‘Restriction on evidence or questions about complainant’s sexual history. (1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—(a) no evidence may be adduced, and (b) no question may be asked in cross-examination, by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.
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scales to measure Rape Myth Acceptance (RMA) or Acceptance of Modern Myths about Sexual Aggression AMMSA. Through the use of such quantitative research, particular beliefs have been identified as rape myths, to reveal how injustices may occur in the criminal justice system and more broadly. The progress made in rape myth scholarship is a significant part of women's legal history, albeit recent, that includes changes to the law as a consequence. Because of the analogy between the ways in which female behaviour evidence may be interpreted in rape trials, and possibly also in child death trials, I suggest that if one considers the lessons of this area of women’s legal history, it may be helpful to consider the development of the rape myth, to define a novel mothering myth. Such a device may then assist in understanding the relevance and impacts of behaviours referred to in child death cases. Far from representing informal evidence, the (silent) background evidence of maternal behaviours may influence decision making even as the foregrounded expert evidence is held to.

In order to present a new understanding of a mothering myth the following sections examine two key child death cases and the types of behaviours that were admitted within prosecution evidence and used in arguments; secondly, current theorisations of mothering ideology, discourse and myth are briefly considered; thirdly, the feminist legal history of the modern rape myth and its theoretical underpinning is charted. Finally, the paper will analogise from the modern rape myth as defined by Gerger et al, to a new understanding of a modern mothering myth and apply it to examples of maternal behaviour to show how adverse interpretations of maternal behaviours may have contributed to wrongful convictions. In so

16 For example some behaviour evidence is not admissible, s. 41 (n 12); the provision of judicial directions from the publication, Courts and Tribunals Judiciary, Crown Court Compendium Part I: Jury and Trial Management and Summing Up (Judicial College, 2016) <https://www.judiciary.gov.uk/publications/crown-court-bench-book-directing-the-jury-2/> accessed 1 September 2016;
17 Gerger et al (n 7).
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It is hoped that a study of recent women's legal history may inform a related but separate aspect of women’s experience.

Child death cases: expert evidence and maternal behaviour evidence

In the late 1990’s and early 2000s, a number of child death cases occurred in the UK, in which white middle and working-class mothers were wrongly convicted of killing their children. In seeking to understand why such convictions occurred, courts and commentators focussed on individuals such as: expert witnesses, pathologists and defence advocates; organisations such as: the criminal justice system (CJS) and the media; and flawed medical materials and unreliable forensic science. But, although the limitations of expert evidence and how this was handled by the CJS have dominated the historical foreground, other evidence was admitted, in the form of non-medical or non-forensic materials such as maternal behaviour and childcare. Although the admission of non-medical information may seem sensible, at the law-science divide when scientific evidence has limitations often under appreciated by legal fact finders, and medical opinions are contested, controversial or scant,

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18 This term is used to refer to cases in which women, as mothers and child carers were convicted for murder or manslaughter, following the unexplained and unexpected death of an otherwise healthy child in their care. Some of the deaths were termed Sudden Infant Deaths (SIDS) or Sudden Unexplained Deaths in Infancy (SUDI). SID or SUDI, previously known as cot death, are terms used by Coroners to register infant deaths where, following post-mortem, no explanation has been found, such as an infection or metabolic disorder.

19 For example, Clark (No 2) and Cannings (n 1) and see also (Angela) [2004] EWCA Crim 1, [2004] 1 WLR 2607; R v Gay (Angela) R v Gay (Ian Anthony) [2006] EWCA Crim 820, 2006 WL 1078909; R v Donna Anthony (Appeal against Conviction) (No 2) [2005] EWCA Crim 952, 2005 WL 81600.

20 Non-medical evidence may be defined in a number of ways, but is used here to refer to information that is not presented by an expert, nor based on research, whether scientific or medical. In the context of the cases examined in this paper the information includes maternal behaviour, child care, internet search history, diary entries, and sexual, personal, social and health history. The term non-medical is used instead of non-expert, in order to avoid confusion, as the latter term is often used to describe evidence purporting to be specialist and its author an expert, but the courts have decided following rigorous scrutiny, that neither the evidence nor the presenter is expert; see Ward T, “‘A New and More Rigorous Approach’ To Expert Evidence In England And Wales’ (2015) 19 (4) International Journal of Evidence & Proof 228; Pattenden R, ‘Conflicting Approaches to Psychiatric Evidence in Criminal Trials: England, Canada and Australia’ (1986) Crim L Rev 92; Pattenden R, ‘The Proof Rules of Pre-Verdict Judicial Fact-Finding In Criminal Trials By Jury’ (2009) 125 LQR 79; Redmayne M, Expert Evidence and Criminal Justice (OUP 2001).

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behaviour evidence may be problematic because it may be interpreted stereotypically, or worse, prejudicially. Consequently if such information forms part of the body of evidence as a whole that is considered by the courts, then there is a risk that adverse interpretations of the feminine may occur.

In the primary research analysis from which this paper is derived, several similar cases in which women were prosecuted and some convicted were also examined, to identify whether information about maternal behaviour and childcare was admitted in addition to expert opinion. Trials of female childminders and baby-sitters likewise prosecuted for the deaths of children in their care were included. Information about carer behaviour and childcare was admitted in all cases considered apart from two, suggesting that whilst a court may be focussed on evaluating opposing expert opinions, specific maternal behaviours may be normatively admitted and presented as background material.

22 Stereotype defined as ‘a widely held but fixed and oversimplified image or idea of a particular type of person or thing e.g. the stereotype of the woman as the carer’ Oxford Dictionaries, <http://www.oxforddictionaries.com/definition/english/> accessed 19 May 2016.


27 Underdown (n 8) and Walker HCJAC (n 8); in Walker the wrongful conviction was based upon the lack of proper judicial directions on expert evidence and in Underdown the defence offered no argument even though expert opinion for the prosecution was significantly flawed.

28 Including whether the mother: commenced immediate resuscitation; called the ambulance, or failed to call the ambulance; called her husband first; used an apnoea monitor consistently or not; forgot in which cot a baby died; had an addiction or dependency; reacted hysterically or over emotionally, or in an attention seeking way. Other factors that were described were a mother who: was inexperienced; had unrealistic expectations; found it difficult to bond with her child; gave the child to someone else to care for; disliked being home alone; felt resentful if their partner was away from home; had had a previous cot death; had a dirty home; was vulnerable or who had been abused as a child; went back to work.
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of circumstantial evidence is illustrated in brief details from two leading cases, Clark and Cannings.29

Sally Clark had three children and two died suddenly in infancy. Following the second death suspicions were raised that Clark may have killed both children.30 Charged with murdering her two sons by smothering, and following trial, she was found guilty and imprisoned.31 Her first appeal was dismissed,32 but following referral to the Criminal Cases Review Commission (CCRC) a second appeal was successful.33 Although the prosecution had argued using (flawed) statistical34 and (now discredited) medical opinions,35 that Clark had smothered her sons to death she was acquitted at second appeal. Microbiology test results not disclosed at trial indicated that the second son’s death may have been the result of a cerebrospinal fluid infection.

The way in which Sally Clark, a highly educated solicitor was portrayed at trial and at first appeal is significant. Despite being described positively as a ‘normal, happy, caring mother’36 i.e. a good mother, she was also and more damagingly referred to as a woman who resented being left alone, and, who ‘tended to drink more heavily when her husband was away’.37 Such statements may have been true, but the latter may also have been perceived as more

29 Clark (No 2) and Cannings (n 1).
30 R v Clark (Sally) (Chester Crown Court 9 November 1999).
31 ibid.
32 R v Clark (Sally) (Appeal against Conviction) (No 1) 2000 WL 1421196 (CACD).
33 Clark (No 2) (n 1).
34 ibid paras 96, 99 per Kay LJ. At trial expert witness Professor Meadow was quoted as saying the odds of two infants dying from natural causes in one family were 1 in 73 million and those odds he suggested, were equivalent to placing a bet on a horse at the Grand National at odds of 80 to 1 for four consecutive years and winning. ‘Yes, you have to multiply 1 in 8,543 times 1 in 8,543 and I think it gives that in the penultimate paragraph referring to a Table 3.58 in which a calculation was made by the authors of a research study by Fleming P Blair P Bacon C et al, ‘Sudden Unexpected Deaths in Infancy the CESDI SUDI Studies 1993-1996 (TSO 2000) 92 Table 3.58 referred to in Clark (No 1) (n 32) para 131 per Henry LJ.
35 Meadow R, The ABC of Child Abuse, (3rd edn BMJ Publishing Group, 1997) 29 ‘one sudden infant death is a tragedy, two is suspicious and three is murder, unless proven otherwise.’ This opinion represented as a ‘law’ was based upon the opinion expressed in Di Maio D J Di Maio V J M, Forensic Pathology (Elsevier, 1989) 291 ‘It is the authors’ opinion that while a second SIDS death…is improbable, it is possible and she should be given the benefit of the doubt. A third case, in our opinion, is not possible and is a case of homicide’.
36 Clark (No 1) (n 32) para 17 per Henry LJ.
37 Clark (No 1) (n 32) para 87 per Henry LJ.
prejudicial to Clark’s credibility than probative of the essential questions, because of the way in which mothers dependent on alcohol may be regarded. In addition, the fact that she had been the sole carer of both her infant boys who died was (wrongly) argued to be similar fact evidence of her culpability. At her successful appeal however Kay LJ held that ‘[c]hildren frequently spend the majority of the early part of their life in the sole care of their mother’. A different inference and a different framing of the evidential relevance of and interpretation of childcare facts were presented at the second appeal. Although her conviction was overturned using fresh forensic evidence, the probative value at trial and at first appeal of Clark’s alcohol dependency was given greater evidential weight than in the second appeal judgement. These short examples from Clark indicate that it is not only the weight of medical opinions that may vary and bear contradictory interpretations at different stages within a child death case, but interpretations of evidence of maternal behaviour vary also.

Clark’s experiences were similar to those of Angela Cannings who had four children three of whom died suddenly in infancy. Tried for the murder of two of her children by smothering, the prosecution used circumstantial evidence and medical opinion to argue that Cannings had murdered two of her three children. Despite conviction, she was later acquitted because medical opinion suggesting that the rarity of three infant deaths in one family was evidence of murder was unsafe. In addition to medical opinions the appeal report also includes conflicting information about maternal behaviour and childcare. On the one hand, ‘There was

\[38\] Clark (No 1) (n 32) paras 95-102 per Henry LJ.
\[39\] Clark (No 2) (n 1) para 15 per Kay LJ.
\[40\] Cannings (n 1); and also see Donna Anthony convicted of two counts of murder in R v Anthony (Donna) (Bristol Crown Court, 17 November 1998), by smothering her two babies on similar medical opinions to those presented in Clark and Cannings and her acquittal at her second appeal on similar grounds Anthony (No 2) (n 19).
\[41\] Meadow R, The ABC of Child Abuse, (3rd edn BMJ Publishing Group, 1997) 29 ‘one sudden infant death is a tragedy, two is suspicious and three is murder, unless proven otherwise.’ This opinion represented as a ‘law’ was based upon the opinion expressed in Di Maio D J Di Maio V J M, Forensic Pathology (Elsevier, 1989) 291 ‘It is the authors’ opinion that while a second SIDS death…is improbable, it is possible and she should be given the benefit of the doubt. A third case, in our opinion, is not possible and is a case of homicide’.
\[42\] Cannings (n 1) para 165 per Judge LJ.
no suggestion of ill-temper, inappropriate behaviour, ill-treatment, let alone violence, at any
time with any one of the four children’. Cannings was described as a ‘woman of good
character, described as a loving mother’. Health visitors reported that she and her husband
had always cared for their children properly, and that Cannings had bonded with her
daughter Jade, who ‘seemed to be a well-cared for and loved baby’. But, as her children all
displayed Acute Life Threatening Events (ALTE), prosecution counsel suggested that
Cannings had smothered one of her sons ‘in an attempt to evoke sympathy’. By suggesting
in this way, that Cannings was mentally ill, counsel may have sought to reduce her credibility
by alluding to the syndrome Munchausen Syndrome by Proxy (MSbP), and that at the very
least, Cannings had something wrong with her as an attention-seeking mother. Once fresh
medical opinion was accepted that three sudden infant deaths in one family could occur
naturally, prosecution narratives included in judicial summing up seeking to syndromise
or portray Cannings as a mentally ill mother no longer carried weight.

Clark and Cannings are but two examples of wrongful convictions of mothers, to illustrate
the possibility that evidence of maternal behaviour may be a part of the evidential picture in
child death cases but, little detailed attention has been paid to whether inferences based on

43 Cannings (n 1) para 160 per Judge LJ.
44 ibid para 4 per Judge LJ.
45 ibid para 66 per Judge LJ.
46 ibid para 94 per Judge LJ.
47 Acute Life Threatening Events (ALTE) where there is no respiratory effort for greater than 20 seconds or for
a shorter period if accompanied by cyanosis or bradycardia.
48 ibid para 59 per Judge LJ.
49 MSbP is a psychological and behavioural condition where someone pretends to be ill or induces symptoms of
illness in themselves. It is also sometimes known as factitious disorder. People with the condition intentionally
produce or pretend to have physical or psychological symptoms of illness. Their main intention is to assume the
"sick role" to have people care for them and be the centre of attention. Any practical benefit for them in
pretending to be sick – for example, claiming incapacity benefit – is not the reason for their behaviour. From the
available case studies, there appear to be two relatively distinct groups of people affected by Munchausen's
syndrome: women aged 20 to 40 years old, who often have a background in healthcare, such as working as a
nurse or a medical technician” see Glossary and UK NHS website <http://www.nhs.uk/conditions/munchausens-
syndrome/Pages/Introduction.aspx> accessed 2 August 2015.
50 Cannings (n 1) para 148 per Judge LJ.
51 ibid para 5 per Judge LJ.
52 see n 40.
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such evidence are reliable. If interpretations of mothering behaviour may have contributed to wrongful convictions, I suggest that the possibility deserves examination and the history and theoretical understandings of motherhood and mothering are considered next.

**Motherhood and Mothering: the history of ideology, discourse and myths**

Motherhood and mothering have been theorised by feminist scholars in a number of ways to provide an ideology of motherhood, a discourse of motherhood and myths of motherhood. However as the following exploration illustrates, these models are broadly conceived and there is a need for a more precise understanding in order to interrogate what may be happening in child death cases.

Bortolaia Silva and Slaughter both drew distinctions between motherhood and mothering on the basis that each term refers to different issues.\(^{53}\) Motherhood in its simplest reproductive sense, refers to the biological connection between woman and child such that motherhood is female, but, care of dependent children or mothering, need not be.\(^{54}\) Of course, mothering and motherhood have been biologically and historically closely linked and continue to be. As a result, Bortolaia Silva suggests motherhood has been theorised as natural, and idealised as a ‘moral vocation’\(^{55}\) for women. Ann Oakley reflected commonly held essentialised ideas about mothers, that ‘all women need to be mothers, all mothers need their children, and that all children need their mothers’\(^{56}\) and that ‘of all the things women are supposed to be, mothers come first’.\(^{57}\) Douglas and Michaels’ writing agrees that beliefs broadly held as myths suggest ‘no woman is truly complete or fulfilled unless she has kids, that women remain the best primary caretakers of children, and that to be a remotely decent mother, a woman has to devote her entire physical,
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psychological, emotional, and intellectual being, 24/7, to her children’. 58 Such beliefs are considered by feminist academics to be historic and deeply embedded in society, 59 and a consequence of patriarchal dominance, 60 at least in this jurisdiction. Helena Kennedy QC observed that the treatment of women by the criminal justice system ‘is constantly determined by the degree to which they conform to a non-legal mythology shared by judges, lawyers and jurors alike’. 61 She identified that in court women were expected ‘to embody nurturance and protectiveness associated with mothering’. 62 Consequently, if women were accused of harming their child, Kennedy noted a ‘heightened outrage’. 63

Nevertheless, the development of an ideology of motherhood i.e. the normative role for a woman has over time been accompanied by a devaluing of mothering, 64 because mothering as child care, fails to generate income, the benchmark of value in a capitalist economy. 65 Consequently, the ideology of motherhood has led to a devaluing of women’s work relative to men’s work, 66 despite a ‘glorification of carers’. 67 In addition, Lois McNay suggests that the term ideology is bound to Marxist theory, regarded as reducing women to a ‘peripheral’ 68 position, unless they are part of the labour force. The perceived issues of ‘women’s

62 ibid 25.
63 ibid.
64 ibid 14; Herring J, Caring and the Law (Hart, 2013) 4.
65 ibid 13.
66 Herring (n 64) 4.
67 ibid 293.
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oppression’ have therefore been regarded as concentrated to an ‘ideological effect’ of secondary importance to class relations. The term ideology has therefore had a valuable function in identifying sets of fixed ideas about motherhood, that Farrelly and McGlynn argue obscure gender inequalities, for example in relation to the public/private divide and paid employment. Further, ideology identifies ideas about motherhood and mothering that may be (wrongly) privileged over other beliefs, such as the extent to which motherhood is natural and therefore without the need for mothering to be taught or learnt. But over time, motherhood and mothering as McNay suggests have historically become downgraded occupations and activities in relation to work outside the home. However, one considers the term, an ideology of motherhood and or mothering does not help when trying to interrogate maternal behaviours in child death cases, such as whether and when an apnoea monitor should be used, or when an ambulance should be called.

The history of and theorisation of discourse(s) have also been extensively studied by feminist scholars, some of whom such including Wallbank, have looked to Foucault’s theory of discourse to ground their arguments. Discourse can be defined in the general sense of the

69 ibid.
70 ibid.
71 ibid 25.
76 Wallbank J. Challenging Motherhoods (Pearson Education 2001) 15; Slaughter (n 182); Smart C, Feminism and the Power of Law (Routledge 1989).
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Oxford Dictionary definition as a debate⁷⁷ - a conversation belonging to everyone with an interest in child care, or, in the Foucauldian sense in which discourses refer to ‘practices which form the objects of which they speak’.⁷⁸ The term discourse is often used because of its fluidity in suggesting development and change; as Wallbank argues discourses can be ‘generative and productive’.⁷⁹ Bortolaia Silva concurs, regarding mothering as complex and shifting, because mothers amongst others ‘continually recreate mothering’.⁸⁰ Theoretically, such an understanding of a discourse of mothering, does allow for the inclusion of new knowledge and practice, the consideration of controversial beliefs,⁸¹ and the rejection of demonstrably dangerous beliefs,⁸² whilst providing a source of normative beliefs. In her project, Wallbank considers the use of discourse theory not only in relation to motherhood,⁸³ but also in relation to further discourses of psychology, children’s needs, and child support.⁸⁴ Discourses ‘are extremely potent’⁸⁵ in establishing a ‘set of rules that may or may not be adhered to by individuals’.⁸⁶ ‘Discourses transmit and produce both power and truth …’.⁸⁷

Such ‘regimes of truth’,⁸⁸ Wallbank suggests, have a powerful influence for example on single mothers who may be perceived or portrayed as not adhering to discourse rules within e.g. child support theory. When a discrete discourse exists, such as that which characterised

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⁷⁹ Wallbank (n 76) 15.
⁸⁰ Bortolaia Silva (n 53) 33.
⁸¹ E.g., the debate that breast feeding is not ‘best’ see Wolf DB, Breast is Best Isn’t It? (NYU Press 2013).
⁸² Gilbert R, Salanti G, et al, ‘Infant sleeping position and the sudden infant death syndrome: systematic review of observational studies and historical review of recommendations from 1940 to 2002,’ (2005) 34 International Journal of Epidemiol 874, conclusion ‘Advice from Dr Spock to put infants to sleep on the front for nearly a half century was contrary to evidence available from 1970 that this was likely to be harmful’; Spock B, Baby & Child Care (6th edn, Common Sense Book of Baby and Child Care, Bodley Head 1979) page 217 para 284 ‘On back or on stomach? A Majority of babies seem, from the beginning to be a little more comfortable going to sleep on their stomachs.’
⁸³ Wallbank (n 76) 4.
⁸⁴ ibid 6-7.
⁸⁵ ibid.
⁸⁶ ibid 5.
⁸⁸ ibid 6.
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child support theory in the past, the normalisation,\textsuperscript{89} internalisation of rules,\textsuperscript{90} and the need for compliance was clear, and good and bad players identifiable. When however we seek to identify a discourse of mothering, there are so many more expectations and assumptions involved that differ across social groupings, and cultural backgrounds, that identifying who is breaking a rule and who isn’t – who is compliant and who not, who is a good mother and who isn’t, becomes more problematic.\textsuperscript{91}

What may be happening in child death cases may therefore be more discoverable using a theorisation that focusses on individual behaviours, and what they mean, rather than or only using a good-bad mother typification derived from the feminist use of Foucauldian discourse. A further difficulty of the good/bad analysis is that it does not allow for the understanding provided by researchers studying mothers who admitting killing their children,\textsuperscript{92} that ‘having killed one’s child is not evidence that one was a bad mother’.\textsuperscript{93} US professors Oberman and Meyer of law and psychology respectively are leading authorities on maternal filicide.\textsuperscript{94}

Based on interviews with women who admitted filicide, they suggest that even such mothers can be perceived as both good and bad. If mothers can be considered simultaneously good and bad, then the compliant/non-compliant dichotomy essentialised within discourse theory, may not be helpful in understanding what may be happening within wrongful convictions in child death cases. Hays suggests that a good mother may be the woman whose life centres around her child, who listens to experts, who sees her work being concentrated on the giving of emotional, practical and financial inputs.\textsuperscript{95} But, such an ideal mother, characterised as the white, middle class, married, heterosexual woman, who has almost exclusive responsibility

\textsuperscript{89} ibid 37.
\textsuperscript{91} ibid 7; Smart (n 75) 192; Weldon EV, Mother, Madonna, Whore: The Idealization and Denigration of Motherhood (Karnac Books 1988).
\textsuperscript{92} Oberman M and Meyer C L, When Mothers Kill Interviews from Prison (NYU Press 2008).
\textsuperscript{93} ibid 67.
\textsuperscript{94} ibid.
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for the care of her child, is actually epitomised by Clark and Cannings. It is possible to argue that the further each mother departed from the good mother model in Clark’s case due to her alcohol dependence, and in Canning’s case due to the unexplained ALTE’s of her children, the more likely it was that they might be wrongly convicted. However, such theorisations are less helpful when seeking to understand behaviours such as the use of a faulty apnoea monitor, whether to seek medical help and or call the ambulance. Motherhood as an ideology, and the good bad mother theorisation as a discourse of mothering are therefore helpful up to a point, but problematic.

Nonetheless, some feminist scholars have proposed that for example, a discourse of motherhood was instrumental in influencing outcomes of child death cases. Celia Wells suggested in relation to Clark and Cannings that the cases ‘provide contemporary evidence that a combination of unsubstantiated assumptions about women … still lead to extraordinary travesties of justice’. Fiona Raitt and Suzanne Zeedyk proposed that ‘hidden factors’ such as ‘underlying assumptions’ and ‘discourses of motherhood’ may have ‘played a major role in the initial convictions of Cannings and Clark’. Emma Cunliffe too has argued that the mechanism for achieving a mother’s conviction for killing her children used discourses of motherhood within legal discourses in order to portray mothers negatively as bad mothers. Thus, theorisations of ‘proper mothering’, the ‘dominant ideology of

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99 ibid Wells 90.
100 Raitt (n 97) 263.
101 ibid.
102 ibid.
103 ibid.
104 Cunliffe (n 97) 37, 100, 101 in relation to her case study of R v Folbigg [2003] NSWSC 895 (24th October 2003); R v Folbigg [2005] NSWCCA 23 and a mother convicted of the murder of two of her infant children, the manslaughter of another and of causing grievous bodily harm to, and murdering a fourth.
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motherhood’,106 and ‘discourses of motherhood’107 have been argued by feminist legal scholars Wells, Raitt and Zeedyk, and Cunliffe respectively in relation to child death cases.

Perceptions of mothers’ failures in fulfilling such benchmarks in child death cases,108 they proposed, had resulted in their portrayal as uncaring and bad109 and that such perceptions explained ‘why they would have murdered their infants’.110 Further, the bad mother typification is claimed by Raitt and Zeedyk and Cunliffe111 to have negatively influenced the outcome of criminal proceedings.

However it is a challenging argument because in most cases studied, the mothers and carers were known to be good if not exemplary mothers and carers. The argument that because mothers failed to conform to the dominant ideology of motherhood112 they were criminalised in child death cases is difficult to sustain, because based on the brief theorisation of ideology here, the mothers in child death cases were meeting both the ideology of motherhood, and a discourse of mothering, having willingly and autonomously chosen motherhood,113 being full time mothers at the time of the child deaths114 and certainly compliant clinic attending mothers.115 In addition feminist discourses of motherhood and assumptions about women

105 Wells (n 98) 99; Smart (n 75) 125; Raitt et al (n 97) 263-4.
107 Cunliffe (n 97) 37 citing at (n 79) Raitt et al (n 97) 264.
108 Clark (No 1) (n 32); Cunnings (n 1); R v Folbigg [2003] NSWSC 895 (24th October 2003).
109 Smart (n 75) 192; Raitt et al (n 97) 267.
110 Raitt et al (n 97) 267.
111 Cunliffe (n 97) 193.
113 However, see R v Kai-Whitewind (Chaha’oh Niyol) [2005] EWCA Crim 1092, [2005] 2 Cr App R 31, in which her second child was alleged to be the result of rape by her partner and also Angela Gay in Gay and Gay (n 19) who chose to be an adoptive mother.
114 For example Sally Clark a corporate solicitor, Trupti Patel a pharmacist, and Angela Gay, an Actuary. Clark (No 2) (n 9); R v Patel (Trupti) (Reading Crown Court, June 11 2003); Gay and Gay (n 19).
115 Clark attended a mother and baby group ‘where she appeared as a normal, happy, caring mother’; her babies ‘were well cared for, loved by their parents and happy and content’; she was reported as a ‘loving, caring mother’ Clark (No 1) (n 32) paras 17, 43 per Henry LJ.
provide no specific link to the particular female behaviours noted in the appeal reports in child death cases. The binary approach that suggests if women are portrayed as bad mothers then they are more likely to be wrongly convicted has been illuminating and helpful, but it fails to overcome the fact that convicted mothers may have complied with benchmarks and discourses of motherhood/mothering well, if not exceptionally well. The binary good vs bad mother argument therefore needs developing to move the argument on from contextual theories of a good-bad ideology or discourse, to a model in which particular individual behaviours admitted or referred to in child death cases can be are identified, empirically researched and challenged in order to substantiate their relevance and admissibility.

Consequently, it is the actual behaviours demonstrated by mothers around the time a child dies, that need addressing, together with particular (possibly prejudicial and biased) beliefs, in the same way I suggest that the history of rape myth scholarship has already focussed on the female behaviours demonstrated around the time of a sexual assault, and the beliefs that are held about such behaviour. For this reason, my trajectory is to develop the mothering myth as a particular way of viewing mothering behaviours, rather than as a set of values, against which to measure maternal compliance. The next section will therefore consider the background to and issues encountered in rape myth scholarship and the development of the beliefs about women’s behaviour characterised as rape myths.

**Feminist legal history of the modern rape myth**

Academic feminist scholarship suggests that particular behaviours can be legally significant in trials involving female rape claimants\(^{116}\) where complainant behaviours just before, at, and after an alleged offence are admitted. Rape myth scholarship has developed rape myth acceptance (RMA) metrics, in relation to particular beliefs and interpretations of feminine

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\(^{116}\) Childs and Ellison (n 119) 11; Ellison L and McGlyn C, ‘Commentary on *R v A (No 2)*’ in Hunter et al (n 75) 205-210.
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behaviour that are currently characterised as *rape myths*. To say however, that interpretations of the feminine and not factual evidence, may influence trial outcomes is problematic because the evidential picture as presented may be so complex, that distinguishing the impacts of individual evidential components is challenging. Trial outcomes have been normatively framed in terms of forensic or scientific evidence to the extent that a lack of forensic evidence, or false complaints, are blamed for the ‘low reporting rates, high attrition rates and low conviction rates at trial’ of sexual assault. Similarly, wrongful convictions in child death cases have been attributed to controversial, poorly contested expert opinions. If a rape case involves the ‘word of a complainant against the word of a defendant, with little or no corroborating evidence, insufficiency of evidence is said to be both the problem and the reason for low conviction rates at trial and high acquittal rates before trial’.

However, scholars such as Cossins argue that ‘myth, prejudice and disbelief surround the reporting, investigation and prosecution of sexual assault, producing a ‘culture of

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scepticism’. 122 Not only is such an approach held to account for police reluctance to investigate some cases, but a ‘culture of disbelief also permeates the criminal trial, including the jury room’. 123 Temkin and Krahe have theorised that the ‘“justice gap”’ 124 identified in sexual offending statistics 125 as the discrepancy between the rapidly rising number of recorded rapes as against a relatively static number of convictions 126 may be explained by such beliefs. But, they have also found that although stereotypical judicial attitudes towards complainants, 127 and unrealistic and stereotypical attitudes of jurors 128 were identified by legal practitioners, factors such as ‘poor policing’, 129 poor defence counsel behaviour, 130 and low standards of advocacy and incompetent prosecuting counsel, 131 also contributed to the justice gap. It is beyond the scope of this paper to explore the statistical evidence and arguments about the attrition of rape complaints and conviction rates in rape trials. The point that is needed here however, is that there is a history of feminist argument 132 supported by judicial commentary, 133 that it is not only factual evidence that influences legal decision making in rape trials, but interpretations of the feminine also.

123 Cossins ‘What Laypeople Think’ (n 122).
127 Temkin and Krahe (n 117) 131.
128 ibid 132.
129 ibid 127.
130 ibid 129.
131 ibid 130.
132 Ellison L and McGlynn C ‘Commentary on R v A (No 2)’ in Hunter et al (n 75) 205.
133 As suggested in the classic Canadian case: R v Seboyer [1991] 2 SCR 577 paras 140-152, 207 per Madame Justice L’Heureux-Dubé.
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Charting the history of rape myths
Understanding the thinking leading to the modern rape myth is I suggest relevant to evaluating mothers’ behaviour in child death cases. But, the nature of myths, and how they are defined has changed over time. The Oxford dictionary defines myths as ‘widely held but false beliefs or ideas’, 134 and suggested myths were uncontested and unconscious assumptions so widely accepted that the cultural and historical origins are no longer remembered. 135 However such definitions raise problematic concerns, if the object is to assert that myths are 1) held by a significant proportion of people and 2) are incorrect. Feminist scholars have long considered that the reason for unjust acquittals in the CJS is due to RMA. Defining such beliefs and demonstrating both their prevalence, and their falseness, has consequently been prioritised in effecting change within the CJS, to balance the argued effects of biased beliefs. However an additional issues has been identified, for example whether such beliefs are linked to behaviour and whether some beliefs function as cultural and protective norms and are therefore always true.

At this stage I should note that for reasons of space only the work of a few scholars are mentioned here, to illustrate the developments in defining the modern rape myth in order to arrive at a meaningful device to interrogate what may be happening in the criminal justice system. This is not to say that the extensive history of individual contributions to rape myth scholarship not mentioned here, are not also generally important.

Martha Burt
Martha Burt’s original rape myth work nearly forty years ago, investigated the extent to which American culture was rape supportive. 136 She identified that cultural norms risked incorporating rape myths into the belief systems of those working with rape victims, resulting

136 Burt (n 15) 228.
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in an institutionalisation of such beliefs in the law.\textsuperscript{137} Burt provided contemporary examples of such beliefs\textsuperscript{138} and later researchers cite further examples used in studies to identify RMA, and considered to justify sexual violence.\textsuperscript{139} Burt’s regression analysis of interview data indicated that ‘settled ways of thinking or feeling’,\textsuperscript{140} about rape or rape attitudes, were ‘strongly connected to other deeply held and pervasive attitudes such as sex role stereotyping, distrust of the opposite sex (adversarial sexual beliefs), and acceptance of interpersonal violence’.\textsuperscript{141} Such associations she concluded, would make change very difficult,\textsuperscript{142} because myths fulfilled cultural functions by endorsing other gendered ideas.

\textit{Lonsway and Fitzgerald}

In their broadly based 1994 review of previous rape myth literature, Lonsway and Fitzgerald supported Burt’s findings of functional interconnectedness.\textsuperscript{143} RMA had at its core gender, traditional sex role attitudes, negative attitudes towards women, and a likelihood of raping,\textsuperscript{144} and they concluded that ‘Such a configuration conveys a powerful message about how RMA relates to other beliefs about women in our society’.\textsuperscript{145} Lonsway et al in concurring with Burt, proposed that myths could be characterised as ‘false or apocryphal beliefs that are widely held’; they explain some important cultural phenomenon; and they serve to justify existing

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\textsuperscript{137} ibid.
\textsuperscript{138} For example, “‘only bad girls get raped’; “any healthy woman can resist a rapist if she really wants to’; “women ask for it”; “women ‘cry rape’ only when they’ve been jilted or have something to cover up’; “rapists are sex-starved, insane, or both”’ ibid.
\textsuperscript{139} See in particular Lonsway KA and Fitzgerald LF (n 15); Gerger et al (n 7), for example, ‘Women often make up rape accusations as a way of getting back at men’; ‘women cry rape’ only when they’ve been jilted or have something to cover up’; ‘a woman who initiates a sexual encounter will probably have sex with anybody’; ‘a woman shouldn’t give in sexually to a man too easily or he’ll think she’s loose’; ‘men have a biologically stronger sex drive than women’; ‘a woman who goes to the home or apartment of a man on their first date implies that she is willing to have sex’; ‘it isn’t a rape unless he has a weapon’; ‘one reason that women falsely report a rape is that they frequently have a need to call attention to themselves’; ‘women often provoke rape through their appearance or behaviour’; ‘men often can’t control their sexual urges’.
\textsuperscript{141} Burt (n 15) 229.
\textsuperscript{142} ibid.
\textsuperscript{143} Lonsway et al (n 15) 134, 156, 158.
\textsuperscript{144} ibid 134, 156, 158.
\textsuperscript{145} ibid 155.
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cultural arrangements’. 146 Nevertheless, despite the identification of the interrelatedness with sexist attitudes, defining a rape myth was complex because of a ‘lack of any comprehensive articulation of the domain of rape myths’. 147 Accordingly, questionnaire scales seeking to measure RMA following those first proposed by Burt, were they suggested unreliable, because different studies used different scales of questions to identify acceptance (or not) of rape myths. 148 In addition, Muehlenhard et al illustrate that myths may be identified using RMA questionnaire scales but, may be more nuanced than anticipated 149 because appreciation of unacceptable sexist and racist beliefs may mean that attitudes are covertly held a point later endorsed by Gerger et al.

Lonsway and Fitzgerald’s own definition of a rape myth therefore took into account the arguments for interconnectedness and functionality, proposing that ‘Rape myths are attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women’. 150 The findings echoed Burt’s, in that rape myths could be expressed as rape supportive beliefs. 151

Gerger et al

Subsequently, in 2007, Gerger et al again challenged previous studies in their own review of RMA literature in seeking to measure how rape myths can be defined and acceptance measured. 152 Despite agreement with the general usefulness of an RMA construct, Gerger et al suggested that most scales produced skewed results 153 as a result of methodological approaches. They developed a new AMMSA scale (acceptance of modern myths about

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146 ibid 134.
147 ibid 156.
148 ibid 155-158.
150 ibid 134.
151 ibid.
152 ibid 423.
153 ibid 424.
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sexual aggression), reasoning that more account needed to take account of recent research into modern sexism and racism, suggesting that a greater degree of subtlety about scale question content areas was needed. Citing Swim et al:

Whereas ‘‘old-fashioned’’ sexism was characterized by the endorsement of traditional gender roles, discriminating treatment of women, and stereotypes about lesser female competence … modern sexism, like modern racism, was characterized by the denial of continued discrimination, antagonism toward women’s demands, and a lack of support for policies designed to help women.

Gerger had therefore identified that perhaps the public has identified, that rape myth acceptance is ‘‘wrong’’ in an ethical sense, and that any measurement scales needed to be worded in a more subtle way, not to catch people out, but to identify more accurately the saturation within study cohorts, of idea acceptance approving sexual violence. The AMMSA scale incorporating more nuanced versions or modern myths, was found to be more reliable and consistent, although limited again by sampling methodologies.

Helen Reece

But, scholars such as Helen Reece have controversially criticised Gerger et al’s work suggesting that rape myths are overstated, ‘some attitudes are not myths; secondly, not all the myths are about rape; there is little evidence that the rape myths are widespread’. Reece raises

154 ibid.
156 ibid.
157 ibid 423.
158 ibid 434.
159 ibid 436.
160 Reece (n 124).
161 ibid 446.
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the possibility that ‘myths about myths or “myth myths”’\textsuperscript{162} have been created. Conaghan and Russell however criticise Reece’s conclusions arguing that Gerger’s AMMSA scale is ‘the most advanced measure of rape myth acceptance to date’,\textsuperscript{163} but in a common sense approach, Gurnham advocates a cautious approach to rape myth work, because of the dangers of ‘mythologizing, stereotyping and essentializing’\textsuperscript{164}

The historical development of rape myth definitions has therefore not been easy. So called unethical beliefs, or RMA or AMMSA, may be demonstrable to some extent, but beliefs may change in content, become more nuanced, be connected with other gendered ideas and be functional for others. The use of the word myth in relation to rape myths, is thus beset by methodological difficulties in defining, demonstrating, measuring, and distinguishing myths as beliefs from other beliefs, Further, understanding the cultural connections and functions were observed by Gerger et al, as did Martha Burt earlier; if some women believe that only dissimilar types of women who behave “inappropriately” are at risk of rape, then they may experience an anxiety buffer, by their RMA.\textsuperscript{165} Likewise, for mothers in general there is a possibility that certain beliefs about mothering, may affirm for mothers (irrespective of criminal proceedings), that they are a good mother, and not a bad or unreasonable mother.\textsuperscript{166}

The significance of this point is further heightened, because women are also decision makers and part of the criminal justice system whether in the role of police, juror, advocate or judge, so caution is needed not to assume that particular beliefs are only held by men and applied to women. Rape myth scholarship suggests that jurors rely on their own or other’s preconceived

\textsuperscript{163} Conaghan J, Russell Y, (n 7) 26, 35.
\textsuperscript{165} Gerger et al (n 7) 424.
\textsuperscript{166} See current online discussion thread about aibu, <http://www.mumsnet.com/Talk/am_i_being_unreasonable> accessed 2 June 2016.
assumptions in making their decisions and Ellison and Munro found in mock jury trials, that female jurors in particular put themselves in the shoes of female rape complainants to argue that they themselves would have behaved differently to the rape complainant. Such a ‘female perspective’ was observed to influence male jurors in mock rape trials and accordingly, a female perspective may operate amongst female jurors considering female behaviour in child death cases also, which similarly influenced male jurors. And so, in considering whether there are identifiable myths about mothering, similar concerns may arise.

Significantly Gerger et al concluded that some beliefs about rape were ‘immune against empirical falsification’, e.g., “Many women secretly desire to be raped”, but were highly ‘prescriptive in nature’. The latter finding was resolved as a core content of a rape myth, not its accuracy or spread, because, if a myth were defined by the number of people holding it, and that spread were found to be low because such beliefs may be held but covertly, then a belief would no longer be definable as a myth irrespective of its perceived problematic content. Including spread within a definition therefore, does not add to conceptual clarity and may even not be necessary.

Gerger et al therefore suggest that ‘prevalence and consistency of rape myths…seem to be better treated as empirical problems, rather than matters of definition so they need not be included in a general definition …’. They therefore proposed a definition of a modern rape myth that: ‘rape myths are descriptive or prescriptive beliefs about rape (i.e., about its

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168 ibid ‘Reacting to Rape’ 209.
169 ibid 206-7.
170 Gerger et al (n 7) 423.
171 Gerger et al (n 7) 423, citing Lonsway KA and Fitzgerald LF (n 15).
172 ibid.
173 Gerger et al (n 7) 423.
174 ibid.
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causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexual violence that men commit against women', 175 thereby including the possibility that by definition some rape myths may be true for some people. Conaghan and Russell support this approach that a key issue in understanding rape myths is not whether rape myths are true or false, or widely held, but whether they are ‘normatively infused’. 176

The modern mothering myth
Consequently in working from the brief charting of the development of the modern rape myth proposed by Gerger, my suggestion is that similar issues will arise in seeking to define a mothering myth as have arisen within the history of rape myth scholarship. 177 Moreover that the binary good bad mothering ideology or discourse 178 will not help interrogate the actual behaviours identified in child death cases as false beliefs, widely held or not. A proposed definition could therefore be that for the purposes of understanding child death cases more fully:

the modern mothering myths are descriptive or prescriptive beliefs about mothering, which serve to support or justify adverse decisions about mothers within the criminal justice system.

In Gerger’s definition of a rape myth, 179 beliefs may be used to deny sexual violence, for example if a belief is held that a woman should report a sexual assault immediately to police and she fails to do that, then she may be, or have been, regarded as lying about her experience. A belief that denies her experience would therefore be described as a rape myth.

175 ibid.
176 Conaghan and Russell (n 7) 39.
177 That is the identification of spread, accuracy, cultural functionality, precipitation of behaviour, and whether a belief is true for some people.
178 Smart C, Law Crime and Sexuality (Sage Publications, 1995) 192; Wells (n 98) 99; Raitt et al (n 97) 263-4.
179 Gerger et al (n 7) 423.
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In rape myth scholarship the type of normative beliefs found to be “‘wrong” in an ethical sense’, \(^{180}\) relate to the behaviour of women at, during and after the time of the alleged sexual assault. \(^{181}\) Similarly in child death cases, the behavioural evidence provided about mothers in the appeal cases concerns interpretations of maternal behaviours immediately prior to the child becoming unwell, whilst the child dies, and following the child’s death. Such beliefs may also be contextualised within a wider normative discourse about mothering, and linked to expectations of women and mothers as carers. For example, that altruistic care for children is or ought to be a mother’s naturally overriding concern, because mothers are ‘constructed and defined through an articulation of their children’s needs’. \(^{182}\)

The beliefs that are further considered in this paper relate to maternal behaviour and child care once mothers realised their child was unwell; whether they should have known their child was dangerously unwell; whether and when they called an ambulance; whether they started to resuscitate the child; whether they used an apnoea alarm properly; what they said and how they behaved before and following the death of a child; and further, whether the mothers should have recalled accurately the circumstances surrounding children’s deaths.

The discussion about maternal behaviour is supported by the understandings provided by rape myth scholarship in a number of ways. First by the way in which behaviour and memory may be affected by traumatic events such as sexual assault. Ellison suggests that in the literature on cases of sexual assault, there is widespread support for the notion that advocates for the defence may as a matter of course, interpret signs of psychological trauma as indicative of

\(^{180}\) Gerger et al (n 7) 423.
\(^{181}\) Ellison L, (n 119) 240 citing at (n 5 and 6) HMCPSI/HMIC, ‘A Report on the Joint Inspection into the Investigation and Prosecution of Cases Involving Allegations of Rape (HMCPSI, 2002) 55 ‘The study notably found that complainants’ behaviour after an assault was a key feature taken into account by prosecutors in their credibility determinations.’
\(^{182}\) Wallbank (n 76) 5.
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lying.\textsuperscript{183} By analogy, there is a possibility that in child death cases also, the use of ‘commonly assumed credibility cues’\textsuperscript{184} such as inconsistent testimony and poor event recall, ‘are potentially misleading when applied to the testimony of those who have witnessed or experienced a traumatic event’.\textsuperscript{185} Secondly, Ellison and Munro’s research indicates that the public (extrapolated to jurors) may attribute responsibility to female claimants because of their behaviour.\textsuperscript{186} For example, the behaviour of the complainant in the lead-up to the incident\textsuperscript{187} or her use of alcohol.\textsuperscript{188} Consequently it is possible that female behaviour evidence in child death cases may have been similarly interpreted as attributing responsibility to mothers if they failed to fulfil prescriptive beliefs about what they should have done, whether call an ambulance, use an apnoea monitor, or refrain from drinking alcohol.

However, there are risks in extrapolating too readily from rape myth scholarship; Ellison and Munro identify ‘key behavioural cues’\textsuperscript{189} that may be used by jurors to attribute responsibility in rape trials, e.g. ‘lack of resistance, delayed reporting and calm complainant demeanour’.\textsuperscript{190}

Alison Saunders, Director of Public Prosecutions (DPP) has acknowledged (in relation to rape) that it is important that cases are constructed ‘without being influenced by or relying on pre-conceived or stereotypical notions and assumptions’.\textsuperscript{191} It would be logical to apply such

\textsuperscript{183} Ellison L, (n 119); Cossins (n 117); Ellison L and Munro VE, ‘Better The Devil You Know? "Real Rape" Stereotypes and The Relevance of a Previous Relationship in (Mock) Juror Deliberations’ [2013] International Journal of Evidence & Proof 299; Runney PNS, ‘False Allegations of Rape’ [2006] Cambridge Law Journal 128; Ellison L and Munro VE, ‘Reacting to Rape’ (n 167).

\textsuperscript{184} Ellison (n 119) 241.

\textsuperscript{185} ibid.

\textsuperscript{186} Ellison and Munro ‘Reacting to Rape’ (n 167) 203.

\textsuperscript{187} ibid 203 citing Lees S Carnal Knowledge Rape on Trial (Hamish Hamilton 1996).


\textsuperscript{189} Ellison and Munro ‘Reacting to Rape’ (n 167) 203.

\textsuperscript{190} ibid.

\textsuperscript{191} Saunders A, ‘Supporting vulnerable witnesses through the Criminal Justice Process’ 26 February 2015
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a view also to child death cases. In practice however, achieving such neutrality has been difficult both in rape cases and child death cases. The SUDI protocol\footnote{Royal College of Pathologists (RCP) and Royal College of Paediatrics and Child Health (RCPCH), \textit{Sudden Unexpected Death in Infancy A Multi-Agency Protocol For Care and Investigation} (Royal College of Pathologists 2004) 1.} states that prior to 2004, professionals such as paediatricians and police often held fixed beliefs about parents whose child (ren) died suddenly.\footnote{ibid.} Further, when observing and interviewing parents, the approach of paediatricians was to ‘think dirty when diagnosing illness in children, and to start from the standpoint that the problems arise from misconduct on the part of the carers’.\footnote{Bache W, ‘When the Law Doesn’t Listen’ (2007) NLJ 1677; William Bache, solicitor to Angela Cannings and formerly a practising solicitor in Salisbury, <http://www.sra.org.uk/consumers/solicitor-check/094683 article> accessed 7 July 2015 referring to the views of pathologist Dr Maurice Green, who later influenced Professor Meadow.} Robert Key MP suggested during a House of Commons debate, in relation to \textit{Cannings}, that ‘the police had made up their minds at an early stage that it stood to reason that the three deaths must be murder’,\footnote{Key R, MP for Salisbury, HC Deb 24 Feb 2004, vol 418, Col 39 WH speaking in the House of Commons following Angela Cannings’ acquittal.} an assertion later challenged by Vera Baird.\footnote{Baird V, HC Deb 24 Feb 2004, vol 418, Col 39 WH ‘in Cannings, there was no sign on the face of it…of any lax investigation by the police…They appeared to be unable to decide what was what and so turned to expert evidence that was intended to help’.

The controversial \textit{thinking dirty} approach may have been overstated, but much of the evidence of maternal behaviour presented in child death cases, was obtained from such witnesses around the time of the child’s death, including police, paediatricians, paramedics, hospital and community health professionals. I suggest therefore that fixed normative beliefs may have been relied upon in child death cases, to appraise maternal behaviour preceding and around the time that a child was found in a life threatening situation, and afterwards if a death ensued. Such beliefs include considerations of maternal mental health in relation to questions of infanticide and theories of attention seeking behaviour and in the following sections, particular aspects of female behaviour in child death cases are examined.

\footnotetext[192]{Royal College of Pathologists (RCP) and Royal College of Paediatrics and Child Health (RCPCH), \textit{Sudden Unexpected Death in Infancy A Multi-Agency Protocol For Care and Investigation} (Royal College of Pathologists 2004) 1.}

\footnotetext[193]{ibid.}


\footnotetext[195]{Key R, MP for Salisbury, HC Deb 24 Feb 2004, vol 418, Col 39 WH speaking in the House of Commons following Angela Cannings’ acquittal.}

\footnotetext[196]{Baird V, HC Deb 24 Feb 2004, vol 418, Col 39 WH ‘in Cannings, there was no sign on the face of it…of any lax investigation by the police…They appeared to be unable to decide what was what and so turned to expert evidence that was intended to help’.
Is possible alcohol dependency indicative of guilt or a mothering myth? Perceptions of women’s credibility within criminal proceedings may be lowered if they are suspected of having consumed alcohol. Cossins suggests that in cases of sexual assault, gender-based double standards may be partly to blame, and Gunby et al cite research indicating that ‘many people are reluctant to believe a woman who states she was raped when voluntarily intoxicated or alternatively hold her in some way blameworthy’. Rape myths consequently may be responsible for acquittals in sexual assault cases, if jurors feel that women are even partly responsible for the rape. Likewise in child death cases, mothers may be negatively perceived because maternal behaviours such as smoking and drinking alcohol have long been regarded as harmful especially if carried out during pregnancy.

Health promotion programmes and research studies by public organisations such as the Royal College of Paediatricians and Child Health (RCPCH), have sought to publicise the dangers and disseminate normative understanding that maternal tobacco and alcohol dependencies harm children. Drinking excess alcohol in pregnancy may harm the unborn child, ‘resulting in “foetal alcohol syndrome”, (FAS) and “foetal alcohol effects (FAE)”, characterised by growth retardation and central nervous system impairment. The combination of alcohol and certain cardiac arrhythmias such as Long QT Syndrome (LQTS) may also be fatal in infants and adults because ‘alcohol abuse is associated with an increased incidence of cardiac

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arrhythmias’.

203 Clark had an alcohol dependency for which she had received treatment
prior to her pregnancies,

204 but the facts of whether she drank in pregnancy or as a mother are
not known, but were inferred by the prosecution. But for her known treatment for
dependency, there is little doubt that her defence could have argued that she was
unquestionably a good mother and a person of good character as evidenced by her health
visitor,

206 GP

207 and nanny.

208

As reported in the first appeal against conviction report, Clark’s health visitor had observed a
close attachment to and bond between Clark and her first ‘responsive’ baby Christopher.

209 Clark attended a mother and baby group ‘where she appeared as a normal, happy, caring
mother’, her babies ‘were well cared for, loved by their parents and happy and content’
and was reported as a ‘loving, caring mother’. She is reported as welcoming visits from
health visitors as part of the CONI programme, indicating she was a responsible mother of
a next infant. Prior to the deaths of her children, health professionals praised her as
exemplifying the ideal of the good mother, by her caring, nurturing and compliant behaviour.

In contrast to Clark’s behaviour as a mother that satisfied normative expectations of
mothering, counsel for the prosecution told the court that on the day of her second son
Harry’s death, she ‘visited the off-licence on two occasions to buy some wine saying (falsely,
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it would appear) that they were having a dinner party that evening.\textsuperscript{214} The implications of such a fact may have raised concerns in juror’s minds, although the CPS could not use the fact of Clark’s alcohol dependency in argument due to a pre-trial ruling, and beliefs in the wrongness of maternal alcohol dependency may have served to support if not justify a guilty verdict. Such views were amply reinforced by media portrayals following the trial when Harrison J reversed his pre-trial ruling. As a result the BBC described Clark as a ‘35-year-old lawyer who drank through both her pregnancies… a lonely drunk… a depressed alcoholic’,\textsuperscript{215} who had received hospital treatment for ‘bouts of severe binge drinking’,\textsuperscript{216} and by The Lawyer, as ‘driven by drink and despair, the solicitor who killed her babies’.\textsuperscript{217}

Clark’s alcohol dependency was suggested at trial, confirmed after conviction, and affirmed in her first appeal where it was reported that she ‘tended to drink more heavily when her husband was away’.\textsuperscript{218} A belief on the part of both jurors and judiciary that a mother may have abused her child is understandable, if she purchases alcohol covertly on the day her second son dies suddenly and unexpectedly and she has received treatment for alcohol dependency in the past. However, holding such a belief in a fixed way within criminal proceedings to support a finding of guilt is not justified. The second (successful) appeal did not mention alcohol at all in its judgement acquitting Clark.\textsuperscript{219} Her possible alcohol consumption on the day her second child died, therefore did not justify either a belief or a decision that she was guilty of murder, nor her continued imprisonment.

The reasons for using Clark’s possible alcohol dependency as part of legal argument in criminal proceedings although understandable, may reasonably be expected to be linked with...
fixed views about the harm that alcohol may cause to children both in pregnancy and when caring for a small child. Not only may such a mother be perceived as selfish, contravening expectations that she should forego autonomous behaviour in favour of altruism, such beliefs may induce prejudicial perceptions of the maternal behaviour. That alcohol dependency is not problematic for any person including mothers, is not my position. But I wish to suggest that raising the fact of Clark’s past alcohol dependency at trial and at first appeal, without evidence of her having drunk excess alcohol prior to the children’s deaths, risked providing the jury with a key behavioural cue, and engaging a fixed belief i.e. a mothering myth in criminal proceedings, that justified the view that a mother with a possible alcohol dependency was responsible and guilty of murder.

Are emotional over reactions indicative of guilt or mothering myths? The consequences of trauma whether through physical violence or sexual assault can result in significant ‘emotional disorganisation’ that may affect the behaviour of otherwise rational women. How such emotions including ‘fear, shock, disbelief, anger, self-blame and embarrassment’ may be expressed varies according to the individual. But such demeanours may diverge from expected norms and consequently may be perceived as bizarre and unexpected and interpreted according to prescriptive beliefs such as rape myths, for example that had not allowed for the impact of trauma on behaviour. Similarly in child death cases, the appeal reports provide evidence of mothers’ behaviour on the days their

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220 Battered Women Syndrome (BWS) now consolidated in s 52(1) Coroners and Justice Act 2009, as an ‘abnormality of mental functioning’, which arose from a ‘recognised medical condition’, ‘substantially impaired D’s ability to understand the nature of her conduct, form a rational judgment, or exercise self-control, and that the abnormality ‘provides an explanation’ for D's doing or being a party to the killing’.

221 Rape Trauma Syndrome (RTS) see Burgess AW and Holmstrom LL, Rape—Crisis and Recovery (Brady 1979) 35.

222 Ellison L, (n 119) 251.

223 ibid.


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children died, and the following sections identify that such behaviour may have been interpreted according to fixed beliefs about how traumatically bereaved mothers should behave, that may have supported trial outcomes.

Clark was on her own at home when she noticed that her son Christopher aged nearly three months was ‘a “dusty grey colour”’ and she knew something was wrong. She picked him up and dialled 999 and asked for an ambulance. There is no mention whether she tried to resuscitate the baby. When the ambulance arrived only two minutes later according to the appeal report, the house was locked on the inside with Clark unable to find the keys. Paramedics entered the house after a ‘neighbour arrived with the spare keys’, to find Clark holding the baby who was already ‘pale, cyanosed, cold and quite rigid’. Clark’s behaviour is described at home, in the ambulance and at hospital; the ambulance driver stated Clark was ‘very distressed, crying and screaming’, she was ‘on the verge of hysteria’ and was so distressed the paramedic could not put the child on the resuscitator. On being told that Christopher was dead, Clark’s ‘reaction was described by a hospital doctor as very dramatic and hysterical’. Further, the doctor branded the behaviour as ‘atypical and the over-reaction made her feel quite uncomfortable’. In addition, a staff nurse stated that Clark had ‘said that her husband would blame her and would not love her any more’. The evidence provided by professional witnesses suggests doubts that Clark’s grief was normal, indicating concern that Clark may have harmed Christopher.

226 Clark (No 1) (n 32) para 36 per Henry LJ.
227 ibid.
228 ibid para 18 per Henry LJ.
229 ibid para 37 per Henry LJ.
230 ibid para 18 per Henry LJ.
231 ibid.
232 ibid.
233 ibid.
234 ibid para 19 per Henry LJ.
235 ibid.
236 ibid.
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Misgivings may have further increased because of discrepancies between Clark’s accounts to ambulance personnel and doctors concerning Christopher’s whereabouts when he died. Clark stated that he was in a Moses basket to ambulance crews, but in a bouncy chair to paediatricians. When the police visited the home at 02.00 am on the night of the baby’s death they questioned the parents and removed both pieces of baby equipment, having already noted on the coroner’s form that Christopher had been found in a bouncy chair. Clark failed to later challenge that discrepancy, and the first appeal report states, ‘The fact that the appellant gave inconsistent accounts of where she found Christopher adds to its significance rather than detracting from it’, as she was unable to remember whether the child died in a bouncy chair or the Moses basket.

It is difficult to tell whether remembering which place the child was in when discovered lifeless was probative as the prosecution suggested, or whether Clark’s memory may have been impaired by the shock of Christopher’s death. Ellison for example suggests that the impact of trauma in sexual assault cases may have a significant effect on memory. ‘Significantly, research suggests that the normal variability of memory can be exacerbated by the impact of trauma, such as that experienced by victims of sexual assault’. It is therefore possible that the risk that Clark may have suffered post-traumatic stress disorder (PTSD) as a result of the death of her child, resulting in impaired memory performance, may have been overlooked by both the defence and judicial summing up. Such a shocking moment of discovery is unlikely to lead to rational thought. The view that detailed memories are always accurate or can be recalled, indicates that evidence of Clark’s faulty memory may have been

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237 ibid.
238 ibid para 19 per Henry LJ.
239 ibid para 20 per Henry LJ.
240 Batt (n 2) 32.
241 Clark (No 1) (n 32) para 20 per Henry LJ.
242 ibid paras 89 (1), 257 per Henry LJ.
243 ibid para 240 per Henry LJ.
244 Ellison ‘Closing the Credibility Gap’ (n 119) 243 citing at n 28 Petrak J and Hedge B, The Trauma of Sexual Assault: Treatment, Prevention and Practice (Wiley 2002).
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interpreted by a fixed belief or mothering myth, that all mothers should remember the factual circumstances of child death. Consequently any inconsistencies would lead to support for an adverse conclusion.  

Clark’s second child Harry, also suddenly stopped breathing in the evening; she called the ambulance whilst her husband commenced resuscitation.  

Again the first appeal court judgement records professional witness evidence about Clark’s behaviour. Paramedics said when they arrived, Clark was ‘running up and down the street outside the house, barefoot, in pyjamas and very distressed’;  

that she had behaved in a “very dramatic and almost hysterical” manner, described as “such an over-reaction”.  

To compound the concerns about Clark at the time of Harry’s death, she could not accurately recall to police in interviews at home, the time that her husband had returned home on the night the second baby died, as she said she had confused the night the second child died with the night the first had died.  

In addition, a few days later the coroner said that Clark had stated ‘she and her husband would try for another baby’. Mrs Hurst said she felt that comment ‘most unusual’, and realised then that Clark had lost two babies. This observation led her to contact a senior police inspector and request a Home Office pathologist to conduct the post-mortem on the second baby Harry.

245 See discussion in chapter four regarding jury decision making in the face of inconsistent witness testimony ref: Ellison ‘Closing The Credibility Gap’ (n 119) 243 citing at n 19 Brewer N, Potter R, Fisher R et al, ‘Beliefs and Data on the Relationship Between Consistency and Accuracy of Eyewitness Testimony’ (1999) 13 Appl Cognitive Psych 297, 310 ‘The influence of testimonial inconsistencies on juror judgments has, however, been specifically examined in several mock-juror studies. This research indicates that highlighting or eliciting inconsistencies in a witness’s statements is likely to be ‘an extremely effective means of discrediting the witness’.

246 Clark (No 1) (n 32) para 3 per Henry LJ.
247 ibid para 44 per Henry LJ.
248 ibid para 258 per Henry LJ.
249 ibid.
250 ibid paras 65, 66 per Henry LJ.
251 ibid paras 46, 67, 270 per Henry LJ.
252 ibid para 270 per Henry LJ.
253 ibid.
254 ibid para 46 per Henry LJ.
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Clark’s behaviour and comments were therefore appraised by professionals and an adverse interpretation was made that her behaviour was not normal. Whether Clark’s comments support an adverse interpretation, is uncertain. Newly bereaved mothers must surely behave as individuals and not according to preconceived essentialised normative understandings. Nevertheless, a coroner is likely to have witnessed many bereaved parents and possibly sufficient to form a view that Clark’s behaviour was aberrant, however, such interpretations about behaviour based upon experience are not the same I suggest, as objective large scale research studies on bereavement behaviour, which are lacking in this area.255

The points identified in this section about Clark’s behaviour are taken from Henry LJ’s judgment dismissing her first appeal. Whereas Clark’s hysteria and distress behaviour is mentioned twenty times by Henry LJ in his legal reasoning, in Kay LJ’s judgment of the second successful appeal,256 both words are mentioned once. It is possible that Henry LJ was persuaded that Clark’s behaviour around the time of her sons’ deaths was so abnormal, it supported if not justified her continuing conviction and dismissing her appeal. However, in the judgement of her second appeal, such factors were barely mentioned. One cannot know the extent to which any member of the court may have believed that the evidence of Clark’s overwhelming distress, confusion and inappropriate comments justified a guilty verdict. But it is clear that in Kay LJ’s judgement, such factors were of no relevance or weight. Accordingly, there is a question whether professionals’ fixed beliefs about behaviour norms of mothers confronted with a dying child supported, if not justified a guilty verdict, without expert evidence from a psychiatrist to support such perceptions, and why therefore defence counsel failed to adequately challenge what may have been mothering myths.


256 Clark (No 2) (n 2) para 103 per Kay LJ.
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How a mother should behave following the death of a child may therefore be impossible to state without over simplification. However as Judge LJ suggested in a second case Cannings, if a fixed and over simplified view is held that ‘lightning does not strike three times in the same place’ then however a mother behaved, ‘might be thought to confirm the conclusion that lightning could not indeed have struck three times’. If the children’s deaths were natural then ‘virtually anything done by the mother on discovering such shattering and repeated disasters would be readily understandable as personal manifestations of profound natural shock and grief’. Judge LJ suggests that maternal behaviour in Cannings was therefore adversely interpreted within the context of and as a result of flawed expert evidence, and the same could be said of Clark. The judicial comments indicate that prejudicial interpretations of maternal behaviour may be very persuasive, especially where expert evidence on the interpretation of pathology findings such as ‘petechial or pinpoint haemorrhages’ and ‘Intra-retinal haemorrhaging’ are complex, controversial and unfamiliar. Moreover there is little indication in Cannings either that evidence of maternal behaviour was robustly challenged by her defence.

257 Cannings (n 1) in which three children died suddenly and without explanation, and the mother was charged with the murder of two children.
258 ibid para 11 per Judge LJ.
259 ibid.
260 ibid.
261 Meadow R, The ABC of Child Abuse, (3rd edn. BMJ Publishing Group 1997) 29, that ‘one sudden infant death is a tragedy, two is suspicious and three is murder, unless proven otherwise’. This aphorism named ‘Meadow’s law’, was based upon the opinion expressed by Di Maio and Di Maio that while a second SIDS death from a mother is improbable, it is possible and she should be given the benefit of the doubt. A third case, in our opinion, is not possible and is a case of homicide in Di Maio D J and Di Maio VJ M, Forensic Pathology (Elsevier, 1989) 291.
262 Clark (No 1) (n 32) para 171 per Henry LJ citing Professor Meadow saying “You have to say two unlikely things have happened, and together it is very, very, very unlikely.”
263 Clark (No 2) (n 2) para 69 per Kay LJ.
264 ibid para 69 per Kay LJ.
265 Cannings (n 1) para 14 per Judge LJ: Mrs Cannings's defence was simple: she had done nothing to harm any of her children. Although she was contending that the deaths were natural, notwithstanding specialist evidence called on her behalf at trial, she could not explain them, and she was not seeking to offer an explanation of her own. And, unusually, she was doing so in the very special context that medical specialists, both domestically and internationally, continue to acknowledge that the death of an infant or infants at home can simultaneously be natural and unexplained, even by them.”
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The appeal judgement records that evidence of Cannings’ behaviour and emotional reactions when her young children experienced apparent or acute life threatening events (ALTE), was submitted in great detail, together with evidence of her use of the apnoea alarm, and who she called when she realised a child was in danger.

Is failing to use an apnoea monitor indicative of guilt or a mothering myth? Cannings was regarded by health professionals as a good mother, and care-giver, with the appearance of an affectionate and caring mother. She had four children of which three died. She was charged with the murder of two. All three suffered from what were referred to as acute or apparent life threatening events (ALTE) where they apparently stopped breathing, and the appeal transcript identified ALTE’s as SIDS in which no death had actually resulted. Prosecution counsel argued that the ALTE’s were the result of Cannings attempting to smother the children by obstructing their upper airways, and the reasoning was supported by evidence that Cannings frequently forgot to use the apnoea alarm.

At the time when the mothers were having their families, those with a new baby where there had been a previous SID, were offered support from the Care of the Next Infant (CONI) programme managed by the University of Sheffield’s Child Health Unit. The worry for parents about how to care for a next infant was considerable, as Frances Rose, who was monitored as a baby explains:

266 ibid para 51, 58, 65, 76, 102, 108, 112, per Judge LJ.
267 ibid paras 47, 52, 57, 58, 61, 63, 64, 76, 77, 78, 97, 99, 100, 101, 103, 104, 108, 109, 111, 112, 157 per Judge LJ.
268 ibid paras 40, 76-82, 93, 108-110 per Judge LJ.
269 ibid para 25 per Judge LJ.
270 ibid para 9 per Judge LJ.
271 ibid para 4 per Judge LJ.
272 ibid paras 77, 78, 157 per Judge LJ.
273 Waite A, McKenzie A and Carpenter RG et al, Report on 5000 Babies Using the Care Of Next Infant (CONI) Programme (Foundation for the Study of Infant Deaths, 1998); Fleming P, Bacon C, Blair P et al, The CESDI SUDI Studies 1993-1996; Sudden Infant Deaths in Infancy (Department of Health, 2000) the CONI programme supported families in which there had been a previous SID, and followed up all subsequent siblings of a deceased infant.
274 The Child Health Unit collated data from professionals and parents for publication in the CONI reports.
I know my parents went through the CONI scheme with me, ending up with a year or so of sleepless nights due to apnoea monitors (23 years ago these were less than accurate!), which gave them a certain amount of peace of mind, but was coupled with countless false alarms. Apnoea is the term used when there is no respiratory effort for greater than 20 seconds or for a shorter period if accompanied by cyanosis or bradycardia, as in an acute life threatening event (ALTE). Apnoea monitors are electronic devices activated by sensors attached to a baby’s chest or abdomen that respond to a baby’s respiratory movements and were provided for families to use when the baby was asleep or at night. Waite et al found that most (86%) families used them. The monitor beeped with respirations and sounded a continuous alarm if the chest or abdomen stopped moving, indicating that respirations could not be detected. A variety of monitors were issued under the CONI programme for home use, but they always had ‘serious drawbacks’ because they were unable to ‘reliably detect life threatening events, their high rate of false alarms…failing to reliably detect when babies stop breathing’. Hence, as in Frances Rose’s example, apnoea monitors often sounded an alarm for no apparent reason, and confidence in monitors ‘gradually declined’ as parents became more aware of the ‘limitations of the apnoea monitors’. As Judge LJ

276 A term given to a bluish colour of the skin and the mucous membranes of the lips and mouth, usually due to lack oxygen and an increase of unoxygenated haemoglobin or deoxyhaemoglobin in the blood stream.
277 A term given to an abnormal slowing of the heartbeat.
278 Acute Life Threatening Event (ALTE): when a baby stops breathing or its heart slows and such events occurred in Cannings (n 1).
279 Waite et al (n 273) 11.
280 ibid.
282 ibid.
283 ibid 19 para 2.
284 ibid 19 para 2.
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pointed out in Cannings, ‘it is not, as some think, a machine which prevents an infant death’. 285

Cannings was issued with a monitor, 286 but her behaviour was argued by prosecution counsel to be anomalous because she often forgot to ensure that it was attached and working, 287 and she reported being unable to remember whether she had heard the sound of the alarm when her babies had stopped breathing. 288 She stated in evidence that ‘the police believed I had never used them [apnoea alarms] at all’, 289 and that police had sound engineers test the alarms. 290 Consequently, prosecution counsel argued that ‘the appellant had not told the full truth about the workings of the apnoea alarm’. 291 Evidence of her inconsistent memories, and emotional reactions was also presented in terms that suggested her behaviour described as, distressed, very shocked, sobbing, retching and vomiting, 292 may like Clark’s have been perceived as too much, and therefore indicative of guilt. 293

Whether the jury believed that because of the strength of Cannings’ emotional reactions and because she did not attach the monitor and listen for it at all times, such behaviour supported a finding of guilt, is difficult to know for sure, however, the prominence given to such factors in the appeal judgement, suggests that at trial, such considerations were significant. Hallett J directed the jury to ‘look at all the evidence’, 294 and therefore maternal behaviour would have formed part of that appraisal, especially as there is no mention in the appeal report of a

285 Cannings (n 1) para 47 Per Judge LJ.
286 ibid paras 47, 57, 63, 76 per Judge LJ.
287 ibid paras 47, 57, 63, 76, 77, 78, 157 per Judge LJ Cannings frequently forgot to put the apnoea alarm on.
288 Cannings A with Lloyd Davis M, Cherished: A Mother’s Fight to Prove her Innocence (Sphere 2007) 101.
289 ibid.
290 Cannings (n 1) paras 111, 157 per Judge LJ.
291 ibid para 157 and alarms are also mentioned at paras 9, 47, 52, 57, 76, 77, 78, 97, 99, 100, 103, 104, 105, 109, 111, 154 per Judge LJ.
292 ibid para 51, 58 per Judge LJ.
293 There is an issue therefore in relation to interpretations of the feminine, that in some cases traumatic events lead to women behaving with too little emotion as in sexual assault cases, and in other cases with too much emotion as in these child death cases. There is a question whether there is any evidence as to the appropriate level of emotion to be shown in any given situation, if such behaviour is to be relied upon as evidence in criminal trials. See chapter six discussion of mock jury research.
294 Cannings (n 1) 2607 para 167 per Judge LJ.
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defence challenge to such evidence. In addition, although Clark and Cannings may be distinguished by Cannings having lost three babies and Clark having lost two, both were part of the CONI programme and issued with monitors, however Clark did not use the apnoea alarm at all during the day, and this fact was not raised in evidence. A belief might be held that in Cannings’ home where the young infants suffered repeated ALTE’s, twenty four hour monitoring should have been in place. However, monitors were known to be unreliable, infants were under continuous observation and monitor use as a decisive factor in criminal proceedings was inconsistent.

Consequently it is possible that heuristics may have played a part in juror decision making. For example, as Temkin and Krahe suggested in relation to rape trials, counterfactual thinking has been observed to occur when mock jurors are invited to re-imagine a situation such as a rape, and ask themselves what could have been done differently. In such circumstances, mock jurors are more likely to blame the person they have just imagined acting differently. If instead of a rape, the mock jurors were to imagine an ALTE and imagined what could or should have been done differently, then theoretically jurors might blame the mother for not making sure the child was attached to a working apnoea monitor. Of course that may be a very reasonable belief, but whether the belief supports or justifies a finding of murder, given the known difficulties of monitoring instruments, is a different matter. Nevertheless it is possible that failing to use an apnoea monitor may have been used by the jury as a key behavioural cue in attributing responsibility to the mother.

As Judge LJ later suggested, it was possible that given the large number of experts called and the complexity of the evidence given, that the jury ‘may not, inadvertently, unconsciously, have thought to itself that if, between them all, none could offer a definitive or specific

295 Clark (No 1) (n 32) para 69, 47 per Henry because they had had ‘trouble with the CONI monitor giving false alarm’, ‘They only used the monitor at night’.
296 Temkin et al (117) 49.
explanation for these deaths, the Crown's case must be right’.\textsuperscript{297} Or, if evidence of maternal behaviour was interpreted using fixed beliefs combined with heuristics, a guilty verdict was supported and justified because the expert evidence was so inconclusive, thus presenting the possibility of a \textit{mothering myth}.

In relation to the way beliefs about mothering may be applied within the criminal justice system, my argument is that beliefs about mothering may be true for some people, but not everyone. If, however beliefs are held in a fixed way, within criminal proceedings they may support or justify an adverse conclusion. For example, if in the context of child care a belief is held that when a child is ill, immediate assistance should be sought urgently such as an ambulance, then any mother or parent who fails to do so, may be considered with suspicion. However, in the context of criminal proceedings, if an immoveable belief is held that such behaviour is ‘indicative of non-accidental injury’\textsuperscript{298} (NAI), then there is a possibility that an injustice may occur. The omission may be caused by factors other than NAI, such as shock, as a result of previous traumatic experiences including SIDs, inexperience, or a genuine lack of appreciation of the seriousness of a child’s condition.\textsuperscript{299} Then, relying on the fixed belief within criminal proceedings that not seeking help urgently is proof of NAI, or even murder, can be described as a \textit{mothering myth}.

**Does evidence of behaviour indicate guilt?**

Maternal behaviours, such as alcohol dependency, mental health, attention seeking behaviour, emotional responses that appear unusual or excessive, omitting to resuscitate or call for help, or not using an apnoea alarm as instructed or expected, may be questionable, and justify admission as evidence. There is little indication however, that maternal behaviour or mental

\textsuperscript{297} Cannings (n 1) para 170 per Judge LJ.
\textsuperscript{298} Stacey (n 26) para 44 per Kennedy LJ.
\textsuperscript{299} See \textit{LB of Islington} (n 25); \textit{R v Gay} (n 19); Cannings (n 1); Stacey (n 26).
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health was interpreted using peer reviewed research, nor were the effects of bereavement on the mental health and behaviour of mothers\textsuperscript{300} considered in relation to objective studies. It is therefore possible that during criminal proceedings, beliefs about maternal normative behaviour when children were very ill, were, or became prescriptive and censorious.

As a result, it is possible that beliefs about what should have constituted maternal behaviour during particular and critical moments, supported and justified adverse conclusions, as mothering myths, perhaps assisted by other heuristics such as hindsight bias\textsuperscript{301} and counterfactual thinking.\textsuperscript{302} Further, the mothers’ acquittals based on fresh expert evidence indicate that such behaviours were not considered relevant or of significant weight at appeal.

Few similar child death cases have occurred since Clark and Cannings, and it is possible that such outcomes were greatly influenced by particular expert opinions, now discredited or more cautiously used. It is also possible that evidence of behaviour may not have influenced jurors. But, given the emphasis on such behaviour evidence at trial within a context of complex, inconclusive and controversial expert evidence provided by large numbers of expert witnesses, I suggest that particular maternal behaviours when children were very ill, may have provided the jury with significant cues, triggering justificatory adverse conclusions that mothers were responsible, even if expert opinions were inconclusive. The difficulty for jurors in child death cases, as in rape trials is that inferences of behaviour evidence are believable, and once a belief is held that a mother may be guilty, then even a judicial instruction ‘to

\textsuperscript{300} Brabin, Wilson, Hartog, Clark (n 255).
\textsuperscript{301} Temkin and Krahe (n 117) 50 the hindsight bias, indicates that if perceivers have been told the outcome, e.g. a rape, of a series of events, that they would then construct the information leading up to the rape stereotypically, blaming the woman.
\textsuperscript{302} ibid 49.
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discount the believable, will be just as ineffective as an instruction to believe the unbelievable’,\textsuperscript{303} i.e. that a mother is innocent.

Consequently, it is possible that beliefs about the significance of maternal behaviour at key critical moments, or mothering myths, may have supported or justified adverse decisions within criminal proceedings. The reasons why such evidence is admitted therefore, need to be more carefully examined. If as Redmayne suggests, behaviour indicates disposition, then the possibility exists that some maternal behaviour evidence is prejudicial within criminal proceedings, because of the way in which beliefs about particular female behaviours are held and their context in the wider discourse of mothering. The admissibility of maternal behaviour evidence needs therefore to be considered carefully I suggest, in the same way that the scope for potential adverse interpretations of the feminine are scrutinised in rape trials as charted through the history of rape myth scholarship. In the following section then, an alternative discourse of mothering based upon the modern mothering myth is suggested as a way of better understanding child death cases.

\textbf{An alternative discourse of mothering}

If I take as a starting point a definition of mothering as ‘bringing up a child with care and affection’,\textsuperscript{304} then a discourse of mothering could be defined as a framework incorporating beliefs about mothering and normative behaviour for mothers. Although some beliefs may regulate behaviour in practice because carers want to care for their children in the best way possible, discourse as a collection of multiple individual beliefs remains non-essentialised, setting aside also a generalised conception of proper mothering.


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Sources of knowledge about mothering have been generated in a number of ways; by those in the private sphere who do the mothering,305 their friends and mothers, networks of mothers,306 those who care for mothers,307 and nannies and maternity nurses.308 In the public sphere, child health nurses, midwives309 health visitors,310 doctors,311 child psychologists,312 psychotherapists,313 children’s hospitals314 and Department of Health advisors315 examine research and publish understandings of best practice that inform the discourse of mothering.

A discourse of mothering as theorised here, may therefore be more akin to a debate encompassing multiple conversations from both individuals and the state contributing to and forming knowledge and experience and beliefs.

In Wallbank’s project, decisions about mothers in legal proceedings were considered to be based not only on mothering discourse as practice, but also on related discourses including psychology, child support, and the public interest. However, the understandable perceived divisions between discourses such as mothering, and discourses from psychology or psychiatry may be artificial, because both relate to child care and maternal behaviour. What is

309 Royal College of Midwives (RCM), Evidence Based Guidelines for Midwifery-Led Care in Labour Immediate Care of the Newborn (The Royal College of Midwives Trust, 2012); RCM Maternal Emotional Wellbeing and Infant Development (RCM, 2012).
311 Spock B, Baby and Child Care (1st edn, 1946 Common Sense Book of Baby and Child Care, Bodley Head 1979); King T, Feeding and Care of Baby (Whitcombe & Tombs Ltd, 1942); Leach P, Your Baby and Child (4th edn Dorling Kindersley 2010); Stoppard M, Complete Baby and Childcare (Dorling Kindersley 2008).
315 Shribman S, Billingham K, Healthy Child Programme: Pregnancy and the First Five Years of Life (Department of Health 2004).
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important in legal proceedings therefore, is not the allocation of the belief to a particular framework or discourse, but the nature of the particular belief about what should happen, and how it is applied in criminal proceedings to what actually happened.

For example in Claire F, the Court described the mother serving a long term prison sentence in a Mother and Baby Unit (MBU) as ‘making an excellent job of mothering’. There were no concerns ‘about Claire’s behaviour or about her handling of Lia-Jade’. To make its decision however, the court relied upon consultant psychiatrists, with whose expert opinions Munby J agreed, that the mother ‘seemed, however, less able to put the interests of her child above her own, as time went on…’. In addition, ‘Several of her statements to camera were about her feelings and her needs, rather than the child’s’.

Further, the court considered not only normative beliefs based on ethics of care, and maternal altruism, but also expert opinions on attachment theory, to interpret the mother’s behaviour. Without wishing to comment whether the decision in this case was rightly decided, I wish only to focus on the beliefs that the court relied on to appraise the mother. Although the court recognised that mothering was excellent, they did not clarify what they meant by mothering. I suggest the court’s view of mothering in this case, was constructed as hands-on practical child care, and considerations of maternal behaviour were constructed as a domain of expert discourse.

316 Claire F v Secretary of State for the Home Department, Lia-Jade F (a Minor by her litigation friend the Official Solicitor) [2004] EWHC 111 (Fam) 2004 WL 229322 para 15 per Munby J a judicial review examining whether the Secretary of State had properly decided to separate a baby from her mother at nine months.

317 Dr Dora Black, Honorary Consultant Child and Adolescent Psychiatrist at the Traumatic Stress Clinic in London and Honorary Consultant at the Royal Free Hospital, at the Great Ormond Street Hospital for Children and at the Tavistock Clinic giving evidence in Claire F (n 316) para 9 per Munby J.

318 ibid para 9 per Munby J.

319 ibid.

320 ibid para 133 per Munby J.

321 ibid.

322 See Herring (n 64) 68 ‘governing the extent to which a mother is normatively expected to be altruistic, and sacrifice her own needs in order to put a child first’.

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However, in order to analogise from rape myth work to child death cases and the potential for mothering myths, I suggest maternal behaviour needs to be included in a theorisation of mothering, because normative beliefs about mothering are so focussed on how mothers should behave, not only on how a mother is expected to keep a child fed and clean. Both areas of knowledge I suggest, generate beliefs about what constitutes mothering. The categorisation and privileging of beliefs about mothering as expert opinion or psychiatric/psychological discourse, therefore risks overlooking such beliefs as the source of potential mothering myths when applied in criminal proceedings. Consequently, mothering should encompass beliefs that both influence and appraise maternal behaviour and child care because they are normative, internalisable and regulatory, such as the need for altruism and bonding, irrespective of the source classification.

**Mothering and beliefs**
That women as mothers are the best carers of children, and that the care of children is mainly the responsibility of mothers, is a normative belief highlighted as a matter of concern by feminist commentators.\(^{324}\) Jill Marshall argues that such a belief constructs both maternity and motherhood in terms of connection, physically and emotionally”.\(^{325}\) Categorised by Farrelly and McGlynn as a ‘traditional conception of motherhood’,\(^{326}\) the belief that ‘a child is best cared for by a blood-related parent, preferably the mother, in person for the first three years’,\(^{327}\) has also been characterised by Schiek, as a *dominant ideology*.\(^{328}\) The notion of a dominant ideology of motherhood, which ‘privileges the mother-child relationship and in

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\(^{324}\) Farrelly et al (n 72); McGlynn (n 72); Caracciolo (n 196) 242; Schiek (n 72) 364.


\(^{326}\) Farrelly and McGlynn (n 72) 207.

\(^{327}\) Schiek (n 72) 364.

\(^{328}\) ibid.
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which childrearing is considered to be the primary responsibility of mothers’, has been criticised by feminist commentators for ‘replicating traditional assumptions about motherhood and parenthood’. Nevertheless, developmental psychologist and cultural/difference feminist scholar Carol Gilligan, has argued that women are nurturers because they focus on relationships, needs, connection and context in contrast to men, who she submits, focus on abstracted rules, and individualism. In describing an ethic of care based upon nurturing, Gilligan argues that women are defined through their connectedness and their relationships with others, particularly children. As McGlynn and Marshall and Robin West, however point out, there are dangers in a discourse of mothering that is predicated on the belief that only women or women should, care for children. Such beliefs risk reinforcing gender stereotypes, devaluing women, maintaining the subject status of women, exceptionalising particular attributes (being a woman), whilst failing to account for other compelling needs for autonomy, through a professional career and generation of income from employment.

Consequently, the belief that women are wrongly expected to be naturally or inevitably charged with primary responsibility for the care for children, is countered by argument that such a belief is legitimate, and that child care is a choice made autonomously. However, a belief that mothers should care for children instead of giving that task over to others, would within criminal proceedings if used to support or justify a negative decision about a mother who went back to work, constitute a mothering myth, for example in the case of actuary

330 ibid.
332 ibid 177.
333 McGlynn (n 249); Marshall (n 325); West (n 75) 81.
334 Gilligan (n 331).
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Angela Gay, who did just that. In addition to the fact of care, the approaches to care are characterised by similar tensions, between normative regulations of behaviour and individual autonomous choices in carrying out child care.

**Altruism**

Alongside the belief that women care for children, is the belief that mothers are unselfish and self-sacrificing in so doing. Bortolaia Silva, argues that such an expectation has been constructed from religious discipline based on the Judaeo-Christian ideology of Woman as a mother. She ‘alone devotedly, unselfishly and wisely gives herself to the task of reproducing new generations’. The belief in maternal selflessness has however been criticised by Robin West for being ‘self-annihilating’, because it may create ‘injured, harmed, exhausted, compromised and self-loathing “giving selves”’. Rather than creating individuals who are truly compassionate, West suggests that women care because of a need for acceptance and a fear of sexual violence. Consequently, women undertake the ‘repetitive, physically exhausting and emotionally demanding work involved in raising children’, and ‘their self-sacrifice is assumed both by the participants in the relationship and by the outside society as exemplary of virtue’.

Commentators such as Diemut Bubeck too, see little reason to applaud altruism. Bubeck suggests an unselfish ethic of care is a ‘catalyst for exploitation’, and West likens altruism to a stunting of the self, a loss of personal integrity and ‘exemplary of injustice’. The issues of self-sacrifice may be further compounded because, as West argues, although ‘Courts and

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335 See Gay and Gay (n 19) and the judicial comments made of prospective adoptive parent, Angela Gay.
336 Bortolaia Silva (n 53) 10.
337 West (n 75) 81.
338 ibid.
339 ibid.
340 ibid 82.
341 ibid 81.
342 ibid.
343 Bubeck D, Care, Gender and Justice (OUP 1996) 177.
344 West (n 75) 82 and 82-3.
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Judges do not themselves enter into relationships of care ... they are deeply complicit in the construction of those relationships. Consequently, if criminal courts believe that mothers should submit their own needs to those of their children, there is the possibility that such a belief may be used to justify an adverse finding against a mother perceived to be acting selfishly in her own interests. For example, if she goes back to work, or as a professional she admits to finding it hard being at home alone, or because of her immaturity, she gives her child to her own mother to care for then, a fixed belief in altruism that justifies an adverse decision within criminal proceedings would represent a mothering myth.

Bonding
A further element in the discourse of mothering is emotional attachment or bonding. The theory was developed by child psychotherapist Donald Winnicott, and psychologist, psychiatrist and psychoanalyst John Bowlby. A woman who normatively raises her child herself in a natural, instinctive and nurturing manner, may be regarded with approval as fulfilling her child’s emotional needs. Bowlby argued that mother-love in infancy, enabled a child to form an attachment to her, which facilitated the later formation of healthy attachments to others. Attachment theory has become normatively powerful, and as in Claire F, legal proceedings may rely on an appraisal of the attachment between mother and child, to make decisions about mothers. For example in child death case Kai-Whitewind, the mother’s inability to bond with her child, was noted as supporting evidence, justifying an adverse decision, and distinguishing Cannings despite the conflict between competing expert

345 ibid 83.
346 See Gay and Gay (n 19) and the judicial comments made of professional, Angela Gay.
347 See later analysis of Clark (No 1) (n 45) para 87 per Henry LJ in which Sally Clark was criticised for resenting her social isolation at home.
348 Anthony (No 2) (n 19) para 25 per Judge LJ. ‘Mrs Anthony told the police that her parents looked after Jordan for 60 per cent of the time’.
349 Bowlby (n 313).
350 Claire F (n 316).
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opinions about how the child died.\textsuperscript{351} The possibility of a prescriptive and normative belief that bonding must and should take place, may therefore arise in criminal proceedings and an absence of attachment may indicate that a mother was likely to harm her child. But, if a mother admits to having, or has been observed to show difficulty in forming an attachment with a child, there may be many reasons. For example, she may have had postnatal depression, a difficult birth, the child may be the result of rape\textsuperscript{352} or she may have had a previous SID or stillbirth.\textsuperscript{353} Accordingly a fixed belief that absence of a bond justifies a prejudicial decision in criminal proceedings, could also constitute a mothering myth.

\textbf{Child care}

Within the wider domain of mothering discourse, innumerable further normative expectations are situated, relating to how child care is carried out, and each may be used to appraise mothers in criminal proceedings either singly or together. For example, feeding a child, maintaining a clean home,\textsuperscript{354} hygiene and play provision, maintenance of health during pre-conception,\textsuperscript{355} pregnancy\textsuperscript{356} and when children are young.\textsuperscript{357} In addition, considerations whether to lie a baby on its front or back, to sleep,\textsuperscript{358} whether to attend clinics, or permit immunisations and even whether mothers are believed to know and understand what mothering is about,\textsuperscript{359} are a few of the many aspects of child care constituting mothering as defined in this paper. However, my argument is that within criminal proceedings normative

\textsuperscript{351} Kai-Whitewind (n 198) paras 15, 16, 17, 88, 133, 139 per Judge LJ.
\textsuperscript{352} The mother’s failure to bond as a result of alleged rape in Kai-Whitewind (n 198)
\textsuperscript{354} See R v Smith (Margaret) (Leeds Crown Court, 22 October 2002) a convicted mother described as inadequate with a filthy home, who was acquitted at appeal in Jenkins R, ‘Mother Cleared of Baby Murder Had Stabbed Husband to Death’ The Times (London, 10 November 2004).
\textsuperscript{357} ibid.
\textsuperscript{358} Smart (n 75); RCP (n 192) 3 citing 600 SUDI deaths in the UK in 2004 <http://www.rcpath.org/NR/rdonlyres/30213EB6-451B-4830-A7FD-4EEFF0420260/0/SUDIreportforweb.pdf> accessed 28 February 2015 citing the Department of Health Back to Sleep campaign in 1991, 30.
\textsuperscript{359} Anthony (No 2) (n 19) para 25 per Judge LJ: ‘a witness statement from Donna Anthony’s mother stated her daughter did not initially understand ‘what motherhood was like.’
individual beliefs about mothering, may justify adverse decisions, i.e. as mothering myths, not only in unselfishness or attachment, but also in relation to home hygiene,\textsuperscript{360} the use of apnoea alarms,\textsuperscript{361} or refraining from negative health behaviours.\textsuperscript{362}

The effects of inhaled cigarette smoke, drinking alcohol or ingesting other legal and illegal drugs, have been well documented to cause harm via the placenta to unborn children.\textsuperscript{363} Beliefs that particular behaviours threaten the interests of both unborn and born children as identified in medical and psychosocial research for example perceptions of alcohol abuse in \textit{Clark},\textsuperscript{364} may therefore be a constituent of normative discourse of maternal behaviour, in judging mothers in child death cases. I therefore argue that the domain of a discourse of mothering contains many normative beliefs generated and developed through private and public debates. Children are cared for presumptively by mothers, who are expected to know how to care, and to do it altruistically. Mothers are responsible for forming the child’s first template for attachment, and they must feed and maintain a healthy environment for the child both in pregnancy and after its birth. As Wallbank argues, mothers are ‘constructed and defined through an articulation of their children’s needs’.\textsuperscript{365}

The impact of such a wide discourse of mothering may therefore lead to an essentialism based upon connection, or an “ideology” of motherhood’.\textsuperscript{366} Jill Marshall argues that such an ideology, leads some to find it difficult to perceive of mothers as independent autonomous

\textsuperscript{360} RCP (n 192) 74; And also see \textit{Smith} (n 274) a convicted mother described as inadequate with a filthy home, who was acquitted at appeal in Russell Jenkins, ‘Mother Cleared of Baby Murder Had Stabbed Husband to Death’ \textit{The Times} (London, 10 November 2004).

\textsuperscript{361} Apnoea monitors are electronic devices activated by sensors attached to a baby’s chest or abdomen that respond to a baby’s respiratory movements and were provided for families of next infants following a SID, to use when the baby was asleep or at night. See later analysis of the interpretation of Angela Cannings’ behaviour in not relying on apnoea monitors all the time, in Cannings (n 1).


\textsuperscript{363} Cave (n 200).

\textsuperscript{364} See Sally Clark’s alcohol dependency and how that may have been interpreted in \textit{Clark (No 1)} (n 32) para 87 per Henry LJ who stated that ‘Clark tended to drink more heavily when her husband was away’.\textsuperscript{365} Wallbank (n 76) 5.

\textsuperscript{366} Marshall (n 325) 330.
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‘persons - or human beings - in their own right, as legally and philosophically understood, with choices to make about ways of being and living.’ Accordingly, the framework represented by a discourse of mothering in this paper, is constituted by normative expectations of mothers, and this view of women’s subjectivity is based on a normative absence of autonomy. Within the criminal justice system therefore, there is a risk that mothers are judged by fixed beliefs. But if mothers exhibit behaviours that transgress normative beliefs, that may be shocking because a mother may therefore be perceived to have threatened the interests of the child. Whether going back to work, not calling an ambulance, not achieving bonding, not checking an apnoea alarm, abusing alcohol, or simply not knowing that a child was so ill they shouldn’t have walked to the hospital but should have dialled 999 instead, I suggest mothers may be judged against fixed normative beliefs, and not by the logic or rationality of their decisions.

However, none of the discussion here suggests that the beliefs are wrong in principle. Smoking around children, alcohol abuse, keeping an unhygienic home or being selfish are poor ways to care for a child. But, if beliefs are applied in criminal proceedings, in a fixed and oversimplified way, without considering what really happened as opposed to what should happen, to justify an adverse decision, then using the definition of a mothering myth, informed by rape myth scholarship, such a decision may be flawed. Decisions therefore based on interpretations of the feminine may unjustly influence outcomes in criminal proceedings, in child death cases.

368 Hunter et al (n 75) 20.
Conclusion and limitations

This paper has sought to show the limitations of current theorisations of motherhood and mothering, and to illustrate how the findings of the history of rape myth scholarship may be helpful in better understanding child death cases, by proposing a modern mothering myth. Such a myth has been discussed in application to leading child death cases and in relation to a number of other cases decided in this jurisdiction. One significant limitation in this paper is whether one can analogue from one area of women’s legal history to another. Tosh as a leading historian, is cautious of historical analogies based upon similarity, and his preferred use of such analogies is to demonstrate divergences between situations with common factors. Analogies illustrating similarity are however widely used in the common law and the argument here focusses on the similar potential for adverse perceptions of women’s behaviours both in rape cases and in child death cases. Nonetheless, an important divergence is that rape myth scholarship has at times focussed on its carceral impacts, but using mothering myths may result in acquittals not convictions, although both outcomes may be perceived or portrayed as miscarriages of justice. The controversial use of historical analogy and its associations with closing down debates, is however less of an issue here, where the effort is directed at challenging current thinking, opening up debate, and exploring women's’ legal history to identify a working device such as the modern mothering myth.

Finally, referring to rape myth scholarship as a history of women's legal experience, may be considered a stretch perhaps for being so contemporary, but again, John Tosh whilst affirming that history represents ‘an inventory of past experience’ suggests that history includes ‘even the recent past’, because it is ‘different from the present’. Accordingly,
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women’s legal history can be recent experience also, and applied to current problems,\textsuperscript{374} despite the possibility that such a process may be unsettling in a number of ways.\textsuperscript{375} Perhaps this paper may disrupt current feminist understanding of ideologies, discourse, and myths about mothering. The aim however is to add to and move the debate onwards towards a more critical understanding of mothering myths, increased awareness of their potentially dangerous impacts in the criminal justice system and perhaps even empirical work. Nevertheless both specifically and more broadly, we must remember that what is a myth for some, may be a truth for others.